In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 432

MORAND BROTHERS BEVERAGE CO., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO PETITION FOR REHEARING

To support their petition for rehearing of this Court's order denying their petition for a writ of certiorari, petitioners claim that the decision below is in "direct conflict" (Pet. for Rehearing, p. 2) with the decision of the Court of Appeals for the Second Circuit in *National Labor Relations Board* v. *James Thompson & Co.*, 33 LRRM 2205, 2206-07 (December 2, 1953). No conflict exists.

The *Thompson* decision is but the most recent addition to the list of cases included by petitioners

in their original petition for a writ of certiorari (pp. 22-23); these cases have in common the circumstance that a reviewing court found unpersuasive the Board's reasons for reversing a trial examiner's findings which rested predominantly on credibility resolutions. It suffices to say of the *Thompson* case, as we explained with respect to the cases previously cited by petitioners, "The different results in the cited cases are attributable merely to the circumstances and the particular facts of the particular case." (Bd's. Opp., p. 18.) The Second Circuit in the *Thompson* case recognizes that even on questions of credibility a trial examiner's findings are not conclusive, but properly observes that the Board's reasons for reversing a credibility determination must be especially cogent because the printed record fails to preserve the demeanor evidence to which much weight must be given. The court below does not express nor imply a different standard. Indeed, both the Board and the court below were careful to point out that reversal of the examiner in the instant case did not involve any rejection of his credibility determinations. The Board noted that it accepted the "Trial Examiner's resolutions of the credibility of witnesses, whenever such resolutions have been made" (R. II. 51). The court below observed that "It [the Board] accepted his resolutions as to credibility" (R. II. 889, 881). Thus the Board differed with its examiner solely in evaluating the competing objective circumstances disclosed by the record. As we explained in our original opposition (pp. 16-18),

correctly applying the rule of review laid down by this Court in *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, the court below considered the entire record—including the examiner's report—and concluded that the Board's findings had substantial support. There is, therefore, no basis for a claim that the court below in this case has differed with other Courts of Appeals in interpreting the import of the *Universal Camera* rule, or that different results reflect anything more than differences in the records reviewed.

Respectfully submitted,

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DECEMBER 1953.

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